

NATIONAL  
SKI AREAS  
ASSOCIATION



February 3, 2006

NEPA Draft Report Comments  
c/o NEPA Task Force  
Committee on Resources  
1324 Longworth HOB  
nepataskforce@mail.house.gov  
FAX: (202) 225 5929

**Re: Comments on Report Draft Findings and  
Recommendations**

Dear NEPA Task Force:

The National Ski Areas Association (NSAA) submits these comments in response to the December 21, 2005 Draft Findings and Recommendations of the Task Force. NSAA is the trade association for ski area owners and operators. It represents 332 alpine resorts, accounting for over 90% of the skier/snowboarder visits in the United States. Of the 130 ski areas permitted to operate on public land, 122 are NSAA members.

NSAA's public land resort members have a great deal of experience with the NEPA process. The U.S. Forest Service is typically the lead agency for resort NEPA processes, as almost all public land resorts operate under a special use permit (SUP) from that agency. On the basis of the collective experience of our member resorts, we submit the following comments on the findings and recommendations presented in the Report. We applaud the efforts of the Committee and Task Force to address this important issue.

**Addressing Delays in the Process**

We strongly support Recommendation 1.2 to amend NEPA to add mandatory timelines for the completion of NEPA documents. Eighteen months should be

sufficient time to complete an EIS, and 9 months should be sufficient for an EA. Assigning CEQ with the decision of whether to allow an extension is appropriate. The extension decision cannot rest with the lead agency. CEQ may want to consider issuing guidelines on the criteria that would be used to determine if an extension should be granted. The circumstances under which an extension may be granted should be limited and extraordinary. Other state and federal programs have successfully used mandatory deadlines and can serve as a model.

We strongly support Recommendation 1.3 to amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS). In too many instances an EIS is completed rather than an EA, or an EA is required rather than a CE, resulting in increased costs and delays in project approvals. Such clarification would reduce uncertainty and minimize the need to attempt to "bullet proof" documents from appeal.

We strongly support Recommendation 1.4 to codify the criteria for the use of supplemental NEPA documentation. The Forest Service is increasingly requiring resorts to prepare SEISs in situations where they are not legally required. The result is again delays in the NEPA process and increased expenditures on the part of the resort and the agency—not improved decision making. For example, in the past environmental groups have demanded SEISs in circumstances where a species was proposed for listing, or a road building suspension was put in place. The courts have repeatedly held that these types of actions, which do not result in on-the-ground changes or “new information” that was not already addressed in the EIS, do not trigger an SEIS. Ironically, SEISs are also required because delays in the initial NEPA process are so pronounced that project opponents can claim that the original analysis is stale.

A related and equally unfortunate trend that should be addressed is the requirement of a second or even third EIS by the agency. In our recent past, Loon Mountain in New Hampshire, Mount Ashland ski area in Oregon, and White Pass ski area in Washington have all been subject to multiple EISs *for the same project*. Multiple EISs are required at times in attempts to avoid challenges to the original NEPA analysis, or because the initial EIS process took so long that the analysis underlying it can no longer be considered current. The result is seemingly endless and expensive analysis—not necessarily the sound decision-making intended by NEPA. One suggestion might be to add as a recommendation "codify the criteria for requiring multiple NEPA documents for the same project" or, better yet, eliminate the practice all together.

## **Public Participation**

We question the appropriateness of Recommendation 2.1 to give weight to localized comments. Just because someone doesn't live next to a ski area

doesn't mean they are not affected by the decisions made there. In the case of ski areas, our guests come from all over the country, not just surrounding areas. The comments of a skier or rider from Atlanta or Dallas should be given just as much weight as those coming from someone located nearer to a resort. In some instances, the skier or rider from Atlanta or Dallas may be more familiar with the proposal and the setting than an individual who merely submits a form letter or email and happens to have a local address. The bottom line is that public lands should be managed for all Americans and not just those with a local address.

We strongly support Recommendation 2.2 to amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7. Adding a provision that the maximum number of pages for an EIS should be 300 is warranted and would be greatly beneficial. In the experience of ski areas, EISs have become too lengthy. A cap on pages will help reduce delays and costs associated with the NEPA process.

Additionally, we would urge the Task Force to consider limits or caps on the length of an EA or CE. In our experience, EAs and CEs have become longer and more complicated than intended. Recently we have seen lengthy ski area project EAs that have cost resorts over a quarter of million dollars. CEQ's regulations define an EA as a "concise" document which "briefly provide(s) sufficient evidence and analysis for determining whether to prepare an environmental impact statement." 40 CFR § 1508.9. It is time to amend NEPA to enforce the concepts of "concise" and "brief." Our suggestion would be limiting an EA to 100 pages.

Likewise, Categorical Exclusions (CEs) have become more complicated and costly and should be limited in length. CEs for mere replacements of chairlifts are costing resorts \$40,000 and are similar in length to what an EA should be. These lengthy and costly analyses defeat the purpose of a CE. Our suggestion would be to limit CEs to 10 pages.

### **State, Local and Tribal Involvement**

We strongly support Recommendation 3.2 to allow existing state environmental review processes to satisfy NEPA requirements. This change would reduce duplication of efforts. Whenever environmental reviews are functionally equivalent to NEPA requirements, those documents should be deemed sufficient to meet the requirements of NEPA.

### **Addressing Litigation**

We generally support the recommendation of creating a citizen Suit provision. In particular, clarifying standing, timeframes for challenges and clarifying that parties must be involved throughout the process would be helpful in controlling NEPA litigation. On the other hand, we would not support a citizen suit provision

that allows the prevailing party to recover attorney's fees. In our view, these provisions tend to promote, rather than reduce, litigation.

### **Clarifying Alternatives Analysis**

We support Recommendation 5.1 to amend NEPA to require that "reasonable alternatives" analyzed in NEPA document be limited to those which are economically and technically feasible. We might even take the proposal one step further. In the context of EAs, alternatives should be developed and considered only when there are unresolved conflicts, consistent with § 102(2)(e).

During public scoping of proposed ski area actions, the Forest Service receives numerous comments that are far outside the scope of the proposal. Yet, the agency, trying to be as responsive as possible, addresses and analyzes all of these comments. In some instances, alternatives are developed to address issues raised in scoping even though the alternative proposal does not meet the Purpose and Need for the proposed action. The need for better issue management will only be heightened by the larger volume of comments the agency will receive in the future via email, from participants who may not be well versed in the project specifics. Stricter guidance on alternatives will help agencies dismiss issues outside the scope of the analysis early in the process.

### **Better Federal Agency Coordination**

We strongly support Recommendation 6.1 directing CEQ to promulgate regulations to encourage increased consultation. From our perspective, consulting agencies need to make their views known on significant issues earlier in the process. Increasingly, consulting agencies are weighing in at the eleventh hour on issues that should have been addressed earlier in their comments on the draft environmental analysis. In some cases, the cause is lack of communication and coordination within the agency--or personal agendas--resulting in a "changed course" for the agency at the last minute. Other times, the agency will not make its views clearly known until the end of the process even though it has been involved from the very beginning.

We strongly support Recommendation 6.2 regarding codifying the lead agency status. Often delays can be attributed to the lead agency's failure to require consulting agencies or entities to subscribe to project schedules for scoping, comment periods, and other steps in the process. These trends undermine the NEPA process and cause unnecessary delays.

## **Additional Authority for the CEQ**

We question the need for a NEPA Ombudsman as suggested in Recommendation 7.1. Rather than simplifying or clarifying the process, this additional layer of authority might burden it further. Ski areas have long been advocating the need for the lead agency to demonstrate leadership and be more decisive in decision making. The creation and presence of a NEPA Ombudsman may discourage the lead agency from taking charge and therefore undermine Recommendation 6.2 above.

We strongly support Recommendation 7.2 concerning the control of NEPA costs. The ski industry would favor the development of cost ceiling policies and encourages CEQ to present recommendations to Congress on an expedited basis.

## **Clarifying the Meaning of Cumulative Impacts**

We strongly support Recommendations 8.1 and 8.2 to clarify how analysis of past actions should be done and to identify which future actions are appropriate for consideration. In our view, the Forest Service and NEPA consulting agencies have increased the level of analysis required in the area of cumulative impacts. This trend needs to be reversed through clarification. Challenges to cumulative impacts analysis are a part of almost every appeal or lawsuit over ski area projects. Cumulative impacts analysis is an easy target for environmental groups because of the speculative and uncertain nature of the undertaking and the amount of discretion the lead agency has in deciding the appropriate scope (geographic and temporal) of the analysis. EPA's expansive approach to cumulative impacts analysis has exacerbated the problem.

CEQ's 1997 handbook on cumulative impacts encourages agencies to "focus on *important* cumulative issues, recognizing that a better decision, rather than a perfect cumulative effects analysis, is the goal of NEPA." *Considering Cumulative Effects* at vii. The guide also suggests in this context that agencies apply scoping principles and only "count what counts." *Considering Cumulative Effects* at v. This existing guidance is helpful and should influence any forthcoming clarification on cumulative impacts.

With respect to analysis of future actions in particular, the current trend of exhaustive cumulative impacts analysis is wasting time and diverting scarce resources. Project analysis should be sufficiently detailed based on the circumstances. If facts are reliable and not merely speculative, they should be considered in greater detail. When development plans can be downsized, or even entirely abandoned, it becomes apparent that a detailed look at speculative cumulative impacts can often prove unproductive. We welcome the

implementation of this recommendation and are confident that it will prove helpful in improving the quality of decision-making.

### **Validating Categorical Exclusions**

We would propose a new recommendation on validating the use of Categorical Exclusions. Last year's *Earth Island Institute v. Ruthenbeck* ruling suspended a number of ski area projects that were approved with a Categorical Exclusion (CE). The cloud that the *Earth Island Institute* case placed on the use of CEs will not be lifted until this issue is addressed legislatively. We cannot afford to address projects that should be categorically excluded through an EA or EIS. For that reason, we would support an amendment to NEPA clarifying that projects conducted under CEs are not subject to administrative appeals. The language has already been drafted in the form of H.R. 4091 introduced last year by Congressman Richard Pombo (R-CA) and Congressman Bob Goodlatte (R-VA).

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### **Further Study**

We support Recommendations 9.1 and 9.3 regarding further study on NEPA's interaction with other federal laws and overlap with state mini-NEPAs if the end result will be eliminating duplicative processes. Minimizing duplication among environmental reviews would be extremely helpful in reducing the analysis paralysis that we experience in Forest Service decision-making. We question the benefits of Recommendation 9.2 however regarding a study on the experience of NEPA staff. It is obvious that we need more expertise and training in this area. In our experience, the makeup, training, and expertise of staff teams working on ski area NEPA issues can be greatly improved. Overall, team members do not have the requisite recreation/resort expertise—particularly given the high rate of employee turnover and reassignment. IDT leaders are not provided the leadership training they need to steer the process. Rather than spend money on another study, it would be beneficial to spend that money directly on staff training and implement the shifts in resources needed to address these staffing issues and improve the implementation of the NEPA process.

### **NEPA on the Web**

We would encourage CEQ to seek funding for and establish an online database of NEPA decisions to help simplify and streamline the process even further than the recommendations made above. If agencies could use existing analyses from different projects and different regions to support new decisions or at least provide a starting point on unfamiliar issues, the process would be more efficient and less costly for project analysis teams. It would reduce the time and resources spent by the agency and resorts in addressing commonly analyzed

issues. Examples of the types of resort issues that could be covered in such a database include wildlife mitigation, demand, utilization and capacity issues, and air quality modeling. The database could also include case studies of creative problem solving or successful collaboration on complicated issues among proponents, opposition groups, and government agencies.

Not only should NEPA decision documents be included in this database, but also the *underlying studies that were done in the analysis*. For example, if a ski area in Vermont develops mitigation for black bears, or a ski area in Colorado develops mitigation strategies for lynx habitat, that information should be readily accessible and shared from region to region. Again, this would allow agencies to focus more on what is new in the NEPA process as opposed to re-inventing the wheel. We would support a recommendation to seek funding of such a database.

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Thank you for your consideration of these comments.

Best Regards,

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Geraldine Link  
Director of Public Policy